Supreme Court, U.S.
FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-328

In The

Supreme Court of the United States

October Term, 1989

A. O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,

Petitioners,

v.

JAMES D. SAYLOR and KAAREN SAYLOR, d/b/a UDDER NONSENSE DAIRY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MALCOLM L. MCCUNE
JAMES A. VICK
Counsel of Record
MADDIN, MILLER & MCCUNE
300 James Robertson Parkway
Nashville, Tennessee 37203
615/254-8756

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 28.1 LISTING

Rule 28.1 is not applicable to Respondents, James D. and Kaaren Saylor, d/b/a/ Udder Nonsense Dairy

TABLE OF CONTENTS

Page

RULE 28.1 LISTING i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTS 2

REASONS FOR DENYING THE WRIT 6

I. Third Party Defendants Waived Their Right to Complain 6

II. There was Sufficient Unquestionably Admissible Evidence Presented at the Judicial Inquiry To Establish that the Contact was Harmless and Not Prejudicial and/or to Rebut Any Presumption of Prejudice 9

CONCLUSION 19

APPENDIX ..... App. 1

Testimony of Ms. Bell ..... App. 1

Testimony of Ms. Blake ..... App. 9

Testimony of Ms. Taylor ..... App. 11

TABLE OF AUTHORITIES

Page

CASES

Berry v. DeWitt, 27 F. 723 (Cir.Ct.S.D.N.Y. 1886) 7

Budoff v. Holiday Inns, Inc., 732 F.2d 1523 (6th Cir. 1984)..... 17

DeCrave v. United States, 820 F.2d 870 (7th Cir. 1987).....11, 15

Dennis v. General Electric Corp., 762 F.2d 365 (4th Cir. 1985) 14

Gibson v. Clanon, 633 F.2d 851 (9th Cir. 1980), cert. denied, 450 U.S. 1035, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981)..... 18

Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986) 14, 15

In Re: Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982) 11

McDonough Power & Equipment, Inc. v. Greenwood, 464 U.S. 548, 553; 104 S.Ct. 845, 849 (1984)..... 2

Nolan v. Nolan, 97 F.R.D. 537 (S.D. W.Va. 1983)..... 7

Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984) 12, 15, 16

Remmer v. United States, 347 U.S. 227 (1954)..... *passim*

Smith v. Phillips, 455 U.S. 209 (1982) ...1, 13, 14, 17, 20

Stockton v. Commonwealth of Virginia, 852 F.2d 740 (4th Cir. 1988)..... 14

United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981) *cert. denied*, 456 U.S. 962 (1982) .. 11, 12, 17, 19

United States v. Bassler, 651 F.2d 600 (8th Cir. 1980) 12, 18

TABLE OF AUTHORITIES

Page

United States v. Bufalino, 576 F.2d 446 (2nd Cir. 1978) 8

United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987) 14, 15, 16, 19

United States v. Corporale, 806 F.2d 1487 (11th Cir. 1986) cert. denied, 482 U.S. 917 (1987) 11, 15, 16

United States v. Dean, 667 F.2d 729 (8th Cir. 1982) 7

United States v. Delaney, 732 F.2d 639 (8th Cir. 1984) 12, 16

United States v. Gersh, 328 F.2d 460 (2nd Cir. 1964) 7

United States v. Greer, 620 F.2d 1383 (10th Cir. 1980) 12

United States v. Griffith, 756 F.2d 1244 (6th Cir. 1985) 13, 18

United States v. Hornung, 848 F.2d 1040 (10th Cir. 1988) 11, 12, 15, 18

United States v. Howard, 506 F.2d 865 (5th Cir. 1975) 13

United States v. Leon, 739 F.2d 885 (3rd Cir. 1984) 15

United States v. Littlefield, 752 F.2d 1429 (9th Cir. 1985) 15

United States v. Marshall, 767 F.2d 293 (6th Cir. 1985) 13

United States v. Moten, 582 F.2d 654 (2nd Cir. 1978) 8

United States v. Pennell, 737 F.2d 521 (6th Cir. 1984) *cert. denied* 469 U.S. 1158 (1985) 1, 13, 18

United States v. Robinson, 756 F.2d 56 (8th Cir. 1985) 15, 16, 18

TABLE OF AUTHORITIES

Page

United States v. Shackleford, 777 F.2d 1141 (6th Cir. 1985) 8

United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979) 13

United States v. Wiley, 846 F.2d 150 (2nd Cir. 1988) 15, 18

United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988) 13

Upton v. Harrison, 68 F.2d 232 (4th Cir. 1932) 7

OTHER AUTHORITIES

Federal Rules of Civil Procedure 61 2

Federal Rules of Evidence 606(b) 1, 9, 11, 12, 19

INTRODUCTION

The Petitioners have petitioned this court for a writ of certiorari to set aside the United States Sixth Circuit Court of Appeals' decision filed on April 29, 1989 which affirmed the jury's general verdict finding the defendants liable for fraud and intentional misrepresentation and awarding $875,000.00 in compensatory damages and $490,000.00 in prejudgment interest (JA 40), $350,000.00 of which the Sixth Circuit granted a remittitur due an error in calculation. The Appellants assert that 1) regarding an extraneous juror contact which occurred during the course of the trial, the Petitioners were entitled to the rebuttable presumption of prejudice as set forth in *Remmer v. United States*, 347 U.S. 227 (1954), as opposed to the rule adopted in the Sixth Circuit opinion of *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984) *cert. denied* 469 U.S. 1158 (1985) interpreting *Smith v. Phillips*, 455 U.S. 209 (1982) as requiring the appellant to prove or establish actual prejudice of the contact and 2) that Rule 606(b) of the Federal Rules of Evidence precluded solicitation of evidence or inquiry in a post-verdict hearing of the jurors regarding the effect that the extraneous contact had on their verdict. The petition should not be granted because a determination of the legal issues of 1) which of these rules is proper or 2) whether Rule 606(b) precludes such jury testimony or inquiry is not determinative of this particular case. It is the facts of this case, and not the legal issues raised, which are dispositive of this matter. There was sufficient unquestionable admissible evidence produced at the post-trial *Remmer* type hearing, even if the one question asserted to be proscribed by Rule 606(b)

is totally disregarded, to demonstrate that this juror contact was absolutely harmless, devoid of prejudice and sufficient to overcome or rebut any presumption of prejudice, if one exists. Based upon the evidence produced at the hearing, the district court made a factual determination that "there was absolutely no juror misconduct and any contact which did occur was harmless." Because the contact was "harmless", it is not grounds for granting a new trial.

> . . . The court at every stage of the proceeding *must* disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Federal Rules of Civil Procedure 61; *McDonough Power & Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553; 104 S.Ct. 845, 849 (1984).

FACTS

The first trial of this case, which commenced on January 21, 1985, and resulted in a verdict by the jury against the Petitioners for fraud and an award of $1,000,000.00 in compensatory and punitive damages, was reversed by the Sixth Circuit Court of Appeals and remanded for a second trial only on the grounds that the issue of violation of statute of limitations should have been submitted to the jury.

The second trial of this case commenced on June 8, 1987. During the second week of the trial, a spectator, Ms. Shaw Taylor, commented during a recess to one of the jurors, Ms. Nadel Bell, that "we sat through this whole

case two years ago." (App. 7; JA 520-521) That was the entire content of Ms. Taylor's statement. Ms. Taylor made no statement regarding the result of the first trial. (App. 6-7, 11, 16; JA 520-521, 544-545, 560-561). Upon report of this incident being made to all parties immediately after its occurring, it is undisputed that Mr. Herod, counsel for Petitioner, A. O. Smith Harvestore Products, Inc, (AOSHPI), questioned Ms. Taylor regarding the incident. (JA 87, 94, 546-547). Regarding the conversations with Mr. Herod, Ms. Taylor states:

> I, Ms. Eva Mel Taylor, of 603 North Porter Street, Winchester, Franklin County, Tennessee, being first duly sworn, state: (1) After I had spoken to Ms. Nadine Bell in the ladies restroom during the trial of the case involving Jim and Kaaren Saylor and A. O. Smith Harvestore Products, Inc., I went back into the courtroom. Almost as soon as I arrived in the courtroom, an attorney for A. O. Smith Harvestore Products, Inc., who I now know to be Mr. Rick Herod, came over and asked me some questions; (2) Mr. Herod asked me if I had talked to the juror in the restroom and I told him I did; (3) Mr. Herod asked me what I had said to the juror in the restroom; (4) I told Mr. Herod what I had stated to the juror as I have already testified to in the hearing held on January 21, 1988; (5) I answered any and all questions Mr. Herod asked me and answered them as truthfully as I knew how, after which Mr. Herod walked away; (6) Mr. Herod later came back to me and told me not to worry about what had happened. Mr. Herod said the Judge had said, "It was just one of those things" and I was not to worry about it; (7) At no time did Mr. Herod ask me my identity; (8) The comment made to the juror was casually and inadvertently made to an individual who I recognized as a long ago acquaintance, with no intent to

impart any information to the juror regarding the case. (JA 94).

After being immediately informed of the contact, counsel for all parties were summoned to the Court's chambers. Mr. Herod had questioned Ms. Taylor prior to the chambers conference. Upon inquiry by the court of what action the parties wanted it to take, the Appellants *chose* to go forward with the trial. The Petitioners did not ask the Court for any relief whatsoever, did not ask for a mistrial, did not ask that inquiry be made of the juror involved, did not ask that the juror be stricken, although an alternate was available until the close of the trial (JA 536-537), did not ask the court to inquire of Ms. Taylor regarding the incident, did not ask for further opportunity to question Ms. Taylor themselves, did not have any of the matters regarding the contact or the chambers conference made a matter of record, nor raise the issue after the verdict was returned prior to dismissal of the jury. (JA 87, 90, 490).

At the conclusion of the trial on June 24, 1987, the jury, returned the general verdict in favor of the Saylors. (JA 40). After the trial and the verdict, the Petitioners made a post-trial motion for judicial inquiry regarding the juror contact. On January 21, 1988, the district court conducted a hearing regarding the matter in the presence and with participation of counsel for all parties at which each of the six jurors, the two alternates, the spectator who had made the contact with the juror and, Ms. Blake, the court clerk who was a witness to the contact, were individually examined regarding the facts and circumstances surrounding the contact. (JA 492-575).

During the hearing Ms. Bell, the juror involved in the contact, testified as follows regarding the circumstances and the entire content of the contact.

> THE COURT: Just start at the beginning and tell it through, please.
>
> MRS. BELL: Okay. She just pushed the door open and saw me. I was there washing my hands and she said, oh, hello, Naydell, I haven't seen you in so long and good to see you, and I said – I looked at her and I said I'm sorry I don't recognize you, you know, and I didn't. I said what's your name and it was – I was kind of talking low and she was kind of talking loud and it was like she didn't hear what I was saying. And she just went ahead and made one more statement, and she said, "We sat through this whole case two years ago", I think is exactly what she said. I said, "Oh, I'm sorry, I can't talk about the case." And so we stopped it right there and –
>
> THE COURT: And that's – she said nothing else that you remember? That's the substance of the conversation?
>
> MRS. BELL: Yes. That was the entire remark that was said.
>
> THE COURT: Then you left as you say and came and told the marshal about it?
>
> MRS. BELL: Yes. That's correct. Uh-huh.

(App. 6, 7; JA 520-521).

Ms. Taylor (App. 11-19; JA 555-564) and Ms. Blake, the witness court clerk, (App. 9-10; JA 543-545) testified consistent with Ms. Bell's account of the incident. (App. 3-8, 20-23; JA 516-522, 568-572). The testimony of each of the three indicates no disclosure of which party, if either,

had been successful at the first trial. (App. 6-7, 11, 16; JA 520-521, 544-545, 560-561).

Near the end of the hearing, the Court inquired of the jurors collectively "did you decide it [verdict] on the evidence and nothing else," to which all jurors replied affirmatively. (JA 563)

Following the judicial inquiry, Motions for New Trial Due to Outside Contact With a Juror and submission of briefs, the District Court summarily denied the motion for a new trial upon making a factual determination that "there was absolutely no juror misconduct and any contact which did occur was harmless." (JA 55).

REASONS FOR DENYING THE WRIT

I. Third Party Defendants Waived Their Right to Complain

The Petitioners clearly waived any right to complain about this contact by expressly declining to seek any relief at the time it occurred during the course of the trial.[1] The Petitioners obviously 1) recognized that the incident was not prejudicial; or 2) wanted to give the jurors an opportunity to return a verdict favorable to the

[1] Contrary to the assertion of the Petition, neither the district court nor the circuit court rejected Saylors' argument that the Petitioners waived their right. Neither addressed such argument in any respect, simply found that the Petitioners' motions for new trial were without merit because the contact was "harmless".

Petitioners. A party waives any objection if it knows of an outside influence, even a prejudicial one, before the jury finishes deliberating, "but had nevertheless stood mute, gambling on an acquittal while holding the issue in reserve." *United States v. Gersh*, 328 F.2d 460, 463 (2nd Cir. 1964).

> By their own sworn affidavits Plaintiffs have admitted to having observed what they believe to be misconduct by the opposing party and his counsel, yet they failed to alert the Court or object at trial. It is a well-settled rule that under such circumstances the party has waived his right to object. (citation omitted) The rationale for this rule was aptly stated in one of the first cases to address this question. *Berry v. DeWitt*, 27 F. 723, 724 (Cir.Ct.S.D.N.Y. 1886).
>
> > [M]isconduct of a juror during the trial, if known to the party at the time of its occurrence, and not made the subject of a motion to the Court, is waived. A party cannot know, during the trial, a fatal objection arising from the misconduct of a juror upon the trial, and keep silence, and take advantage of it in the event of an adverse verdict. He is not permitted to "speculate upon the chances of a verdict."
>
> This reasoning was echoed by the Fourth Circuit (then the Circuit Court of Appeals, Fourth Circuit) in *Upton v. Harrison*, 68 F.2d 232, 233 (4th Cir. 1932). "[H]aving been silent when it was his duty to speak, he will 'not be heard to speak when it is his duty to be silent.' *Qui taset consentire viditur.*"

Nolan v. Nolan, 97 F.R.D. 537, 541 (S.D. W.Va. 1983). *See, e.g., United States v. Dean*, 667 F.2d 729, 734 (8th Cir. 1982)

(waived by failure to bring to court's attention during trial even though prejudicial); *United States v. Shackleford*, 777 F.2d 1141 (6th Cir. 1985) (waived by failure to complain when juror contact occurred during the course of trial or prior to dismissal of the jury); *United States v. Bufalino*, 576 F.2d 446, 451 (2nd Cir. 1978) (waived right to complain about insufficient inquiry of jurors by failing to request further inquiry during course of the trial).

Although *United States v. Moten*, 582 F.2d 654 (2nd Cir. 1978) held that no waiver occurred because counsel who failed to raise the issue earlier were denied access to certain relevant facts, the court recognized that a finding of waiver was appropriate where, as in this case, no facts were withheld. The Petitioners talked to Ms. Taylor, she answered all questions asked and they made no effort or requests of the Court to inquire further of Ms. Taylor, Ms. Bell or any other juror at the time the contact occurred. (JA 94). The Court in *Moten, supra.*, 582 F.2d at p. 660, quoted as follows:

> Therefore, Moten, would be entitled to a new trial *only* if he can make a showing of "significant new objective facts" which strongly tend to prove that the Keno affair tainted one or more of the other jurors. (emphasis added).

The Petitioners assert that they were not aware at the time that the contact occurred that Ms. Taylor was the relative of a prospective witness. The Petitioners were not denied this information, they simply did not make inquiry sufficient to make such a determination. In any event, the identity of the spectator or the fact that the spectator was a relative of a prospective witness is of absolutely no consequence because Ms. Bell never knew

or realized that Ms. Taylor was a relative of Mr. Ed Taylor, who later testified as a lay witness in the rebuttal portion of the trial. (App. 21; JA 571). The fact that Ms. Taylor was an aunt by marriage (App. 12; JA 556) of a prospective witness is not a "significant new objective fact which strongly tends to prove" that the contact "tainted one or more of the other jurors" such that the waiver should be disregarded.

II. There was Sufficient Unquestionably Admissible Evidence Presented at the Judicial Inquiry To Establish that the Contact was Harmless and Not Prejudicial and/or to Rebut Any Presumption of Prejudice

Whether the rule of rebuttable presumption of prejudice or the rule that the one seeking a new trial must prove actual prejudice is applied to this case is of no consequence because there was sufficient unquestionable admissible evidence produced at the judicial inquiry, even if the evidence asserted to be in violation of Rule 606(b) of the Federal Rules of Evidence is totally disregarded, to show that the contact was harmless, devoid of prejudice and/or to rebut any presumption of prejudice if one exists. Relying upon *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), and cases which follow it, the Petitioners assert that once established that an extraneous contact occurred, the contact was presumed prejudicial, entitling the Petitioners to a new trial unless the Saylors rebutted the presumption by demonstrating that the contact was harmless. The Petitioners essentially argue that, due to the proscriptions of Rule

606(b) of the Federal Rules of Evidence, after a verdict has been returned by the jury, the presumption is conclusive. Such is clearly not the law.

The *Remmer* rule is not conclusive, but is rebuttable in post, as well as pre-verdict settings. *Remmer, supra.*, 347 U.S. at p. 229. The presumption can be overcome by affirmatively showing that there was no prejudice in fact or that the contact was harmless. *Id.* at p. 229; *United States v. Hornung*, 848 F.2d 1040, 1044-45 (10th Cir. 1988). *Remmer*, which involved a post-verdict hearing, commands at p. 229:

> The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial in a hearing with all interested parties permitted to participate.

Only one question asked at the hearing is asserted to be proscribed by Rule 606(b) of the Federal Rules of Evidence. The Petitioners insist that absent that one question and response, there is no evidence in the record to rebut the presumption that the contact did influence the jury's verdict. A reading of testimony elicited at the *Remmer* type hearing held in this case is all that is necessary to demonstrate the lack of merit in that insistance. There was a complete inquiry by the court in the presence of and with the participation of counsel for all parties of all involved or potentially involved jurors, participants and witnesses to the contact regarding the content of and circumstances surrounding the contact. Such evidence as was produced at this *Remmer* type hearing is not only

admissible but required by *Remmer* to "determine the circumstances, the impact there of upon the juror and whether or not it was prejudicial."

Clearly, a post-verdict hearing could have been avoided by the Petitioners raising the issue prior to the verdict at the time the contact occurred during the course of the trial, rather than waiting until after the conclusion of the trial. Rule 606(b) of the Federal Rules of Evidence, which specifically addresses post-verdict inquiries and reads in part as quoted below, does not prohibit receipt of testimony from or consideration by the court of the facts and circumstances surrounding an extraneous contact or influence in a post-verdict hearing. *United States v. Hornung, supra.*, 848 F.2d at 1045; *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981) *cert. denied*, 456 U.S. 962 (1982); *In Re: Beverly Hills Fire Litigation*, 695 F.2d 207, 213 (6th Cir. 1982):

> (b) **Inquiry into validity of verdict or indictment** . . . except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Federal Rules of Evidence 606(b). Many of the cases cited by the Petitioners in which the rule of presumptive prejudice was applied are post-verdict hearings in which the circumstances surrounding the extraneous influence are inquired into.[2]

---

[2] *See, e.g., DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987) (remanded for post-verdict hearing regarding expert communication with jurors); *United States v. Corporale*, 806 F.2d

(Continued on following page)

United States v. Greer, 620 F.2d 1383 (10th Cir. 1980) is cited by the Petitioners for the proposition that "the effect of the Rule [606(b)] is that a presumption of prejudice cannot be overcome once a jury has reached its verdict." As reflected in Judge Barrett's dissenting opinion, such an interpretation rendering the presumption conclusive is contrary to *Remmer* and to Rule 606(b). *Id.* at p. 1387. The 10th Circuit's subsequent opinion of *United States v. Hornung*, 848 F.2d 1040, 1044 (10th Cir. 1988) specifically considered *Greer* and held that *Greer* does not stand for the "proposition that the presumption of prejudice is irrebuttable once the jury has reached its verdict." *Id.* at p. 1044. Likewise, *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984), although stating that a determination of jury prejudice is complicated by the prohibition of Rule 606(b) on questioning the jurors regarding the affect of the outside contact on their deliberation, held that post-verdict inquiry into the basic facts must be made, from which the court must then make the ultimate factual determination, as follows:

> Rather than question the jurors directly, a district court must make findings of fact at two

---

(Continued from previous page)

1487, 1502 *cert. denied*, 482 U.S. 917 (1987) (11th Cir. 1982) (post-verdict hearing on jury tampering allegations); *United States v. Bagnariol*, 665 F.2d 877, 884 (9th Cir. 1981) *cert. denied*, 456 U.S. 962 (1982) (post-verdict hearing regarding jurors library visit); *United States v. Hornung*, 848 F.2d 1040, 1045 (10th Cir. 1988) (post-verdict inquiry regarding third party contact with juror); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1980) (post-verdict hearing regarding juror notes); *United States v. Delaney*, 732 F.2d 639, 643 n.6 (8th Cir. 1984) (post-verdict affidavit can be used to show circumstances).

> separate levels. First, the district court must find the basic, or subsidiary, facts – e.g., the nature, content, and extent of the extra-judicial contact. Based on its findings of subsidiary facts, the district court must then make the ultimate factual determination: whether the contact likely affected the juror's impartiality. *United States v. Vasquez*, 597 F.2d 192, 194 (9th Cir. 1979); *United States v. Howard*, 506 F.2d 865, 868-69 (5th Cir. 1975).

Id. at p. 646.

Rather than employing the rebuttable presumption of *Remmer*, the Sixth Circuit has held that that the burden of showing prejudice rests on the party seeking to set aside the verdict. *United States v. Zelinka*, 862 F.2d 92, 95-96 (6th Cir. 1988); *United States v. Marshall*, 767 F.2d 293, 295 (6th Cir. 1985); *United States v. Griffith*, 756 F.2d 1244, 1252 (6th Cir. 1985); *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984) *cert. denied*, 469 U.S. 1158 (1985).

In *Pennell, supra.*, in which five jurors received anonymous telephone calls after jury deliberations began, this court held that the rule stated in *Remmer*, and prior Sixth Circuit opinions which relied upon it, was changed by the filing of *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). *Pennell, supra.*, 737 F.2d at p. 532. *Smith v. Phillips, supra.*, 455 U.S. at 217, 102 S.Ct. at 946, which, like *Remmer*, involves a post-verdict hearing fact situation, holds that the proper procedure is for the judge to hold a hearing "to determine the effect of such occurrences when they happen."

Even cases and circuits which follow the rule of presumptive prejudice, including those which expressly

criticize the Sixth Circuit's interpretation of *Remmer* and *Smith v. Phillips*, in *Pennell*, require that in order to invoke the rule of presumptive prejudice that it be shown not only that an extrajudicial contact did occur, but that it was of such a nature as to reasonably cast doubt on the validity of the jury's verdict. *Stockton v. Commonwealth of Virginia*, 852 F.2d 740, 743 (4th Cir. 1988); *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986). These courts have recognized that certain extrajudicial contacts may amount to nothing more than innocuous interventions that simply could not justify a presumption of prejudicial affect. *Haley v. Blue Ridge Transfer Co., Inc.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986); *Dennis v. General Electric Corp.*, 762 F.2d 365, 367 (4th Cir. 1985). If the presumption is invoked, the opposing party "may rebut the presumption through whatever circumstantial evidence is available, including juror testimony on the facts and circumstances surrounding the extraneous communication." *Stockton v. Commonwealth, supra.*, 852 F.2d at p. 744.

United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987) involved a post-verdict judicial inquiry of jurors who were questioned regarding a contact with one juror by the defendant. Although *Butler* states that it is applying the rule of presumptive prejudice, and although it expressly disagrees with the *Pennell* interpretation of *Remmer* and *Smith v. Phillips*, it nonetheless held that the proper procedure was for the judge "to determine whether the exposure of the juror was prejudicial or harmless and appellate courts must defer to this finding on review." *Butler, supra.* at p. 1196. The court held that

the facts of the case fully justified the trial court's ruling that the contact was harmless. *Id.* at p. 1197.

> [T]he inquiries put to the juror need only be sufficiently detailed to permit the judge to determine whether any prejudice is likely to result . . .
>
> the burden of establishing harmlessness, which is placed on the government, is made less demanding by the trial judge's participation and use of all the tools necessary to evaluate the relevant facts. *Id.* at p. 1196.

Each case cited by the Appellants in each jurisdiction which applies the rule of presumptive prejudice recognized that the presumption may be rebutted and the contact may be harmless.[3] Many of those cases held specifically that the contact which was the subject of the case was not prejudicial.[4]

---

[3] *See, e.g., Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535-37 (4th Cir. 1986); *United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985); *United States v. Butler*, 822 F.2d 1191, 1195 (D.C. Cir. 1987); *United States v. Wiley*, 846 F.2d 150, 157 (2nd Cir. 1988); *DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987); *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985); *United States v. Hornung*, 848 F.2d 1040, 1043-46) (10th Cir. 1988); *United States v. Corporale*, 806 F.2d 1487, 1503 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984).

[4] *See, e.g., United States v. Wiley*, 846 F.2d 150, 157-158 (2nd Cir. 1988) (exhibit list in jury room harmless); *United States v. Hornung*, 848 F.2d 1040, 1045-48 (10th Cir. 1988) (unsolicited conversation juror had with bank employee regarding defendant harmless); *United States v. Leon*, 739 F.2d 885, 893, n.20

(Continued on following page)

The facts of this case are not consistent with the type of cases in which prejudice is found to be unrebuttable. In discussing the kind of cases which are generally found harmless, the courts have stated as follows:

> The affected juror was brought into the hearing and extensively questioned. The judge's questioning fully revealed the details of the alleged exchange between the defendant and the juror. The nature of the contact was relatively innocuous; it did not provide the juror with any crucial extra-judicial information, and it did not constitute an attempt to bribe or intimidate the juror, which is the kind of contact that clearly could, in and of itself, prejudice the juror. *Cf. United States v. Delaney*, 732 F.2d 639, 641 (8th Cir. 1984) (extra-judicial information); *Owen v. Duckworth*, 727 F.2d 643, 644 (7th Cir. 1984).

United States v. Butler, 822 F.2d 1191, 1196 (D.C. Cir. 1987).

> No bright line divides cases of juror misconduct that demand reversal from those that must be affirmed. But some similarities are discernible from cases in which convictions were reversed. Juror misconduct generally relates directly to a material aspect of the case. When finding reversible prejudice, courts have described a

---

(Continued from previous page)

(3rd Cir. 1984) (off-handed comment by policeman to juror not prejudicial – record rebutted presumption); *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985) (juror contact between juror and witness casual, unintentional and did not result in prejudice); *United States v. Corporale*, 806 F.2d 1487, 1503 (11th Cir. 1986) *cert. denied* 482 U.S. 917 (1987) (outside juror contact with friends and relatives discussing trial had no effect); *United States v. Butler*, 822 F.2d 1191 (D.C. 1987) (juror contact with the defendant which the juror had relayed to the other jurors harmless).

> direct and rational connection between the extrinsic material and a prejudicial jury conclusion, as distinguished from a connection that arises only by irrational reasoning.

United States v. Bagnoriol, supra., 665 F.2d at p. 885.

Budoff v. Holiday Inns, Inc., 732 F.2d 1523 (6th Cir. 1984), in which the Sixth Circuit court applied the *Remmer* rule of presumptive prejudice prior to its opinion in *Pennell* and ordered a new trial, recognized that a harmless contact does not necessitate a new trial and is instructive on the type of facts situations which are not deemed to be prejudicial by stating:

> Foremost is the fact that the contact in this case was deliberate and purposeful: the employee initiated the telephone conversation purposely to discuss the case with the juror's son. If the contact had occurred by "mere accident or inadvertence, without any improper design," then there could be no "just or reasonable grounds to disturb the verdict" unless it appeared that the contact had an improper influence upon the juror.

The Petitioner asserts that the jurors assurances that the contact did not affect their verdict should not be considered by the court. This court has previously noted in the post-verdict setting of *Smith v. Phillips, supra.*, 455 U.S. at p. 217 n. 7, that "surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind on a certain matter."

"The trial judge is generally in the best position to evaluate the critical question of whether the juror's extra

exposure to extra record evidence prejudiced the defendant." *United States v. Wiley*, 846 F.2d 150, 157 (2nd Cir. 1988). The Court "should access the 'possibility of prejudice' by reviewing the entire record, analyzing the substance of the extrinsic evidence, and comparing it to that information of which the jurors were properly aware". *United States v. Hornung, supra.*, 848 F.2d at p. 1045. The strength of the case against the losing party has a bearing on whether the contact was prejudicial or not. *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1980); *United States v. Hornung*, 848 F.2d 1040, 1045-1046 (10th Cir. 1988).

The trial court has broad discretion in reviewing the affect of extrajudicial information. *United States v. Hornung*, 848 F.2d at p. 1044; *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985). A district court's decision not to grant a new trial after investigating the allegations of unauthorized contact with jurors should be reviewed only for abuse of discretion. *Pennell v. United States, supra.*, 737 F.2d at p. 533; *United States v. Griffith*, 756 F.2d 1244, 1252 (6th Cir. 1985).

> The trial judge is uniquely qualified to appraise the probably effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted, and has heard the evidence. The judge's conclusion about the effect of the alleged juror misconduct deserves substantial weight. *See Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981).

United States v. Bagnariol, 665 F.2d at p. 885. *Accord, United States v. Butler*, 822 F.2d 1191 (D.C. Cir. 1987) ("The judge determines whether the exposure was prejudicial or harmless and appellate courts must defer to this finding on review"). This trial court was aware of the fact that this was the second separate jury that found these Petitioners liable for fraud. There was sufficient evidence to demonstrate that the trial court did not abuse its discretion in arriving at its factual determination that the contact was "harmless", even if the question asserted to be violative of Rule 606(b) is completely disregarded.

CONCLUSION

It is apparent from the cases cited herein that the decision in this case does not rest upon which of the two rules is applied. Under either rule, the decision is one to be made by the court, based upon the facts of the particular incident, to determine whether the contact was prejudicial or harmless. Even where the rule of presumptive prejudice is employed, to raise the presumption the contact must be such as to reasonably cast doubt on the verdict. Once raised, if evidence is sufficient to show that the contact was not prejudicial or was harmless, the presumption is rebutted and disappears. The district court made a determination based upon the facts in this case and found that "any contact which occurred was harmless." (JA 55). The comments made in this case were casual happenstance remarks made without any intent to influence the juror or the outcome of the trial. (JA 94). There was no disclosure of which, if either, party was

successful at the first trial. This was the second jury that found the Petitioners liable for fraud. The trial court, being in the best position to evaluate all the circumstances, did not abuse its discretion. As stated and summarized in *Smith v. Phillips*, 455 U.S. 209, 217, 71 L.Ed. 78, 102 S.Ct. 940 (1982):

> These cases demonstrate that *due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable.* The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; *it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.* Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case. (emphasis added)

It is clear that upon the facts of this case that there was no prejudice, that the contact was harmless and that the decision of the Sixth Circuit was correct, regardless of the rule it employed. The opinion of the Sixth Circuit is an unpublished opinion. On motion for rehearing, not one justice of the circuit court voted for the rehearing or reconsideration of the panel's decision upholding the jury verdict. If the rule of law employed by the Sixth Circuit is to be corrected by this Court, this case, in which the facts

dictate the result regardless of the rule, is not the vehicle by which to correct it. This writ should be denied.

Respectfully submitted,

MADDIN, MILLER & MCCUNE

MALCOLM L. MCCUNE (2660)
JAMES A. VICK (9843)
300 James Robertson Parkway
Nashville, TN 37201
615/254-8756
Attorneys for Saylors

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

AGRISTOR LEASING, a Wisconsin Partnership,

Plaintiff/Counter Defendant,

vs.

JAMES SAYLOR and wife, KAAREN SAYLOR, Individually and d/b/a "UDDER NONSENSE DAIRY",

Defendant/Counter Plaintiff/Third Party Defendant.

vs.

A.O. SMITH CORPORATION. A. O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,

Third Party Defendant.

CIVIL ACTION FILE
NO. CIV-4-83-94

APPEARANCES: January 21, 1988

JAMES A. VICK, ESQUIRE
MALCOLM McCUNE, ESQUIRE
GRACEY, MADDEN, MILLER & McCUNE
300 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37201

Appearing for Defendant/
Counter-Plaintiff and Third Party Defendant.

ROBERT L. CROSSLEY, ESQUIRE
RICHARD E. HEROD, ESQUIRE
BAKER, WORTHINGTON, CROSSLEY,
STANSBERRY & WOOLF
540 SOUTH GAY STREET
KNOXVILLE, TENNESSEE 37902

(p. 2) – AND –

LEE ANN WATSON, ATTORNEY AT LAW
KATTEN, MUCHIN & ZAVIS
525 WEST MONROE STREET
CHICAGO, ILLINOIS 60606-3693

Appearing A.O. Smith Harvestore
Products, Inc.

DAVID J. PFLAUM, ESQUIRE
WATKINS, McGUGIN, McNEILLY & ROWAN
18TH FLOOR FIRST AMERICAN CENTER
NASHVILLE, TENNESSEE 37238

Appearing for Chuck Dowdy.

BE IT REMEMBERED, that the above-styled cause came on to be heard on the 21st day of January 1988, before the Honorable Thomas G. Hull, Judge of said Court, when all parties announced ready to proceed, and the following evidence was introduced, to-wit:

THE COURT: All right. Good afternoon, ladies and gentlemen. Call the case, I guess. Do you have the number?

MS. CLERK: No. CIV-4-83-94, Jim Saylor, et al, vs. Hermitage Harvestore Systems, et al.

THE COURT: All right. Let's see – yes, sir.

* * *

(p. 26) (Witness: Naydell Bell)

THE COURT: Okay. Tell you what, please – I aim to ask this. Let me see y'all just one more time.

(Thereupon, an off-the-record discussion was held.)

THE COURT: Tell you what, Mrs. Lawwell, take her, Ms. Dixie, into the secretary's room. We're going to kind of separate you here a little if you don't mind. All right.

MS. CLERK: You want to call the next one that's listed?

THE COURT: Yeah. Who is that?

MS. CLERK: Naydell S. Bell.

THE COURT: Naydell S. Bell. Make yourself comfortable. We won't keep you any longer than we have to I guarantee you. Would you raise your right hand, please, ma'am?

(Whereupon, the witness was duly sworn.)

THE COURT: Just have a seat, please Mrs. Bell, you were on my jury here that tried this case of James Saylor and wife versus Harvestore Companies; is that correct?

MRS. BELL: Yes, sir.

THE COURT: Okay. And you were (p. 27) subpoenaed to come in here today you don't know why; is that correct?

MRS. BELL: Yes.

THE COURT: Or do you know why?

MRS. BELL: Not exactly. I got a letter, brief letter.

THE COURT: Okay. From the clerk's office –

MRS. BELL: Yes.

THE COURT: – to tell you to come?

Okay. We got snowed out the first time.

MRS. BELL: Yes.

THE COURT: Let me ask you this. Were you in the public bathroom during the course of the time that we were trying this case when other people were there when somebody talked with you about something?

MRS. BELL: Yes.

THE COURT: Okay. Let me ask you, about what – do you remember what day that was?

Was that during a noon hour?

MRS. BELL: No. It was at a recess and, you know, I think it was in the morning part of the day.

THE COURT: Okay.

(p. 28) MRS. BELL: But I just – because when we had the short recesses, ten minute recesses it was hard for all the woman to go to the restroom at the same time, so that particular –

THE COURT: I'm sorry about that. I don't give you enough time.

MRS. BELL: Well, it's just that I happened to ask the marshal do you mind if some of us go down the hall to the restroom during recesses and he said no problem, I'll watch you, you know, go down the hall.

THE COURT: Were you the only juror there at that time or was some others with you?

MRS. BELL: I was the only juror that went to the restroom there and Miss Hopkins happened to be in the restroom at the same time.

THE COURT: Okay.

MRS. BELL: She was in there the entire time I was in there.

THE COURT: Mrs. Blake here?

MRS. BELL: Blake, I'm sorry. Mrs. Blake.

THE COURT: Okay. That's all right. The clerk here; is that right?

MRS. BELL: The clerk. Yeah.

(p. 29) THE COURT: All right. And she was there and who else was there?

MRS. BELL: Okay. Just another lady came through the door as I was about ready to leave and she called me by my name and I didn't recognize her, and then she proceeded to make a statement and I immediately said I can't talk about the case. And I came back and immediately told the marshal and he reported it. So I'm assuming the conversation was loud enough and short enough, I'm assuming Mrs. Blake heard every word that was said and it was an unfortunate incident, you know.

THE COURT: In other words, you did what I told you to do?

MRS. BELL: That's right.

THE COURT: You told them you were a juror and you couldn't talk about it and then you came and reported it to the marshal?

MRS. BELL: That's all I knew to do and I was very sorry it happened.

THE COURT: All right. Let me ask you, have you later found out who that woman is or do you know her yet or do you know where she lives?

MRS. BELL: Yes. I later figured out who it was. It had been about 20 to 30 years since (p. 30) I had seen her so she changed quite a bit. But it was Mrs. Shaw Taylor.

THE COURT: Okay.

MRS. BELL: And I went to church with them when I was young and I hadn't – you know, it's like an acquaintance of any other church member. I didn't have to close personal friendship, but I knew they were nice people and that's all I –

THE COURT: Okay. Now, do you recall what she said and if you can, please give us the conversation what she said and then you've already told us how you responded, but –

MRS. BELL: Yeah.

THE COURT: – just start at the beginning and tell it through, please.

MRS. BELL: Okay. She just pushed the door open and saw me. I was there washing my hands and she said, oh, hello, Naydell, I haven't seen you in so long and good to see you, and I said – I looked at her and I said I'm sorry I don't recognize you, you know, and I didn't. I said what's your name and it was – I was kind of talking low and she was kind of talking loud and it was like she didn't hear what I was saying. And she just went ahead and made one more statement, and she said, "We sat (p. 31) through this whole case two years ago", I think is exactly what she said. I said, "Oh, I'm sorry, I can't talk about the case." And so we stopped it right there and –

THE COURT: And that's – she said nothing else that you remember? That's the substance of the conversation?

MRS. BELL: Yes. That was the entire remark that was said.

THE COURT: Then you left as you say and came and told the marshal about it?

MRS. BELL: Yes. That's correct. Uh hun.

THE COURT: Okay. All right. I'm going to talk to these lawyers and ask them if there's anymore questions. So we're not ganging up on you, but if you'll just stay right where you are, please.

MRS. BELL: Okay.

THE COURT: Why don't y'all come up here?

(Thereupon, an off-the-record discussion was held.)

THE COURT: Now, after you told the marshal about it as you've told us –

(p. 32) MRS. BELL: Uh-huh.

THE COURT: – and you related what happened –

MRS. BELL: Uh-huh.

THE COURT: – did you ever talk to any other – any person else about it that you recall, especially any other of you fellow jurors that day or any other time?

MRS. BELL: No. Absolutely not. I mentioned that an incident happened someone tried to talk to me and I just reported it to the marshal and I said and I can't say anymore, and I didn't say anymore ever, you know, because I felt really terrible that it happened.

THE COURT: During the – after all the evidence was in in the case after the Court had instructed you what the law was and y'all started you deliberations, was anything ever said about that incident during the deliberations?

MRS. BELL: No, sir. No, sir.

THE COURT: Okay. Where did you take Miss – is she out in our office?

MS. CLERK: Yes.

THE COURT: I'm going to put you in a room by yourself. I hate to be so silly. We'll tell

* * *

(p. 53) that all the questions concerning the bathroom scene?

MR. CROSSLEY: Well, if Your Honor please, I think that's all the questions of these witnesses, but it occurs to me that it would be appropriate for Your Honor to interrogate Mrs. Taylor who is here under subpoena, the lady who is said by Mrs. Bell to have talked to her to find out what Mrs. Taylor's interest, if any, was, what her relationship was to any witnesses.

THE COURT: Okay. Where is she? Where is she?

MR. CROSSLEY: She's out in the hall, I think, and Mrs. Blake according to Naydell Bell was in the room when this conversation occurred. I don't know whether you want her testimony for the record or not.

THE COURT: I don't care. She don't – she was there. She has told me she was there. Do y'all want – do you want her testimony or do you want to talk to her before you put her on or – well, not put her on, but –

MR. CROSSLEY: Sure. We'd like to have –

THE COURT: Mrs. Blake, why don't you (p. 54) stand up and raise your right hand.

(Whereupon, the witness was duly sworn.)

THE COURT: Okay. Have a seat in the witness stand. Now, you were in the ladies restroom at the same time that Mrs. Bell and this other woman, maybe a Mrs. Taylor, Mrs. Shaw Taylor was there, is that correct?

MRS. BLAKE: Yes.

THE COURT: What do you remember about the scene? Who was there when you came into the restroom; do you remember?

MRS. BLAKE: I don't know.

THE COURT: Okay. Just pick it up wherever you can remember it and tell us about it.

MRS. BLAKE: Well, all I can remember, there were women in there which I paid little or no attention to and I heard someone make the statement I have – or what I thought she said was, "I have sat through this entire trial," and then this lady which I recognize as Mrs. Bell today, she says I'm a juror in the case and I – don't say anything about the case. I'm a juror, don't say anything to me or words to that effect. And at that time they – Mrs. Bell left.

(p. 55) THE COURT: Did the woman quit talking to here then?

MRS. BLAKE: Yes. There was nothing else said after she said that.

THE COURT: Okay. Then who left? Mrs. Bell left first?

MRS. BLAKE: Yes.

THE COURT: And then you left?

MRS. BLAKE: And I left and I didn't pay any attention to – once she said that, it was over.

THE COURT: Okay. Anymore questions on that?

MR. CROSSLEY: No. Your Honor.

THE COURT: Okay. Come down. Now, you say Mrs. Shaw Taylor is here?

MR. CROSSLEY: We subpoenaed here, if Your Honor please, and would like to have the opportunity to take her testimony for the record.

THE COURT: Let me let you do that, but let me finish these jurors. We need to get into the second phase and that is – now, what exactly are you saying – now, which juror do you now say did nor correctly or forthrightly respond in the questions on voir dire and which questions did they

* * *

(p. 65) (Witness: Shaw Taylor)

THE COURT: What I'm doing is it's not going to be any harm for me to put it in the record and I don't want – if the Sixth Circuit sends this case back, I want to respectfully ask them to send a Judge down here with them to try it. Anyway, bring Mrs. Taylor around.

Mrs. Taylor, would you raise your right hand, please?

(Whereupon, the witness was duly sworn.)

THE COURT: Okay. Just have a seat, please, ma'am. All right, Mr. Crossley.

EVA MEL TAYLOR,

after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROSSLEY:

Q Mrs. Taylor, my name is Bob Crossley and I represent A.O. Smith Harvestore Products, Inc.. I'm going to ask you a few questions if you don't mind. I appreciate you coming here in response to a subpoena. Would you state your name for the record, please?

A Eva Mel Taylor.

Q I'm sorry. Could you speak –

A Eva Mel Taylor.

(p. 66) Q Are you also known as Mrs. Shaw Taylor?

A (Witness moves head up and down.)

Q Okay. And if you would give audible answers. The court reporter is sometimes not looking at you and she needs to hear what your answer is –

A Okay.

Q – if you would. Thank you, ma'am. Where do you live, Mrs. Taylor?

A Winchester.

Q And would you mind stating your age for the record, please?

A 64.

Q Okay. Are you related to a Mr. Ed Taylor?

A Yes.

Q How are you kin to him?

A He's just by marriage. He's no blood kin.

Q Okay. Is he a nephew of your husband?

A Yes. sir.

Q Is that right? And he and his brother operate a dairy?

A That's right.

(p. 67) Q What is his brother's name?

A Charles.

Q And where is that dairy located?

A It's in Lincoln County. I don't know what town. It would be close to Fayetteville, I would think.

Q Okay. Mrs. Taylor, I believe that I observed you and a man who I – is that your husband who was here with you?

A Yes.

Q I believe I observed you and Mr. Taylor sitting here in the courtroom while the case of Jim and Kaaren Saylor was tried in June 1987?

A Yes, sir.

Q Were y'all here for most of the trial?

A Yes, sir.

Q Were you here for the entire trial?

A Of the – I don't remember if we was here every day.

Q Were you here on the first day?

A I can't say that. I don't know what day we were here.

Q Okay. But you were here for most of the days of the trial?

A Uh-huh.

(p. 68) Q You stayed here for the whole thing, stayed here – each day that you were here you stayed here for that entire day's proceedings; is that right?

A Yeah. We stayed the whole time we came. Uh-huh.

Q What was your interest in being here to listen to the Saylor trial in June 1987?

A No more interest than any other trial I go to.

Q Okay. Did you also attend –

THE COURT: Well, how many do you go to?

THE COURT: I've been to several up at the other courthouse, not no trial like this.

Q You mean the other courthouse, you mean the county courthouse?

A Yeah. Murder trials and different things like that.

Q Okay. Did Mr. Taylor go with you to those?

A Uh-huh. Yeah.

Q Did you also attend the trial in January of 1985 I think it was when Jim and Kaaren Saylor had their first trial against A.O. Smith?

(p. 69) A I don't remember the date, but I attended the trial.

Q Did you attend all of that first trial?

A Uh-huh.

Q Mrs. Taylor, you're acquainted I take it with the fact that your husband's nephew Ed Taylor and his brother have a lawsuit pending against A.O. Smith Harvestore Products?

A Yeah.

Q You're acquainted with that fact?

A (Witness moves head up and down.)

Q Is that so?

A Yeah.

Q Have you talked to your husband's nephews about that lawsuit?

A Well, not really what you – go into detail to talk about. I just knew that they said they has them sued for their silage spoiling.

Q Okay. Are you aware of the fact that suit that your husband's nephews have against A.O. Smith Harvestore is basically the same kind of suit as the Jim and Kaaren Saylor case?

A I'd think so.

Q Okay. Did you have a conversation in (p. 70) the ladies washroom with one of the women sitting on the jury in June 1987?

A I spoke to one of the jurors and she said, "I'm not supposed to talk." And I said, "I know that, I have sat through this trial before." And that's all that was said.

Q You sat through the Kaaren – Jim and Kaaren Saylor trial before –

A Uh-huh.

Q – is what you said before?

A I told her I knew I wasn't supposed to talk.

MR. VICK: Well, I object to the form of that last question. The witness said that I have sat through this

trial before and Mr. Crossley injected into his question the Jim and Kaaren Saylor trial.

THE COURT: Well, she'll have to answer the question. Overrule.

MR. CROSSLEY: She already has, Your Honor.

THE COURT: Okay.

BY MR. CROSSLEY:

Q Did you say anything to Mrs. Bell, the juror, about how that first trial had come out?

(p. 71) A No. She was in there and heard what I said.

Q Indicating Mrs. Blake?

A The juror was fixing to go out of the bathroom when I spoke to her and she was in there.

THE COURT: By she you mean the lady in the black suit?

THE WITNESS: Uh-huh.

THE COURT: Dixie Blake is the clerk.

THE WITNESS: I didn't know her name, but she heard what I said. She was in there. I don't know if she was listening.

Q Okay. Did you have an conversations with any other members of the jury?

A That's every word that was spoken. She left, went out of the restroom and I stayed in the restroom.

THE COURT: He's talking about the question did you ever talk to any other jurors –

THE WITNESS: Oh, no.

THE COURT: – other than Mrs. Bell?

THE WITNESS: No. She was just standing in the front of the restroom.

THE COURT: Wait until he asks another question.

(p. 72) *BY MR. CROSSLEY:*

Q Mrs. Taylor, I understand that you knew Mrs. Naydell Bell at some time in the past?

A When a young girl she went to the church I went to and she married and left Winchester and I never have seen her no more until up here.

Q Okay. Did you recognize her when you saw her sitting on the jury?

A Yeah. I did.

Q Do you have an conversations with Mrs. Bell during the time she was sitting on the jury other than the one you've described?

A No, sir. I didn't even know her name, her last name.

Q Okay. When was it –

THE COURT: How many years had it been – you say you knew here as a young girl.

THE WITNESS: Back when she went to church as a young –

THE COURT: You're still a young girl, I guess, but how –

THE WITNESS: No.

THE COURT: – how young a girl were you when you knew her?

THE WITNESS: She was a young girl.

(p. 73) THE COURT: Okay.

THE WITNESS: Naydell I guess –

THE COURT: How long has that been?

THE WITNESS: Oh, that's been 20 years, I guess.

THE COURT: Okay. Have you had any contact with her during that 20 years or had you seen her much before –

THE WITNESS: No. I never had seen her. She married somebody and moved away somewhere and I never had seen here no more until I saw her come in up here.

THE COURT: Okay.

BY MR. CROSSLEY:

Q the time when you went to church with her, that was a long time ago?

A Yeah. I'd say 20 years or maybe longer.

Q Okay. Do you know whether she still goes to that same church or –

A No. She don't go there. When she married I guess she left because I never did see her anymore. But I'm active in the church and I know I would see her if she was there.

MR. CROSSLEY: That's all, Your Honor.

(p. 74) THE COURT: You want to ask her anything, Mr. Vick, Mr. McCune?

CROSS EXAMINATION

BY MR. VICK:

Q Mrs. Taylor, when you made that comment to Mrs. Bell in the ladies room, tell the Court exactly as best you can recall what you said.

A I can tell you exactly to the word. I said, "Hi," and she said, "I'm not supposed to talk."

I said, "I know, I've sat through this trial before."

Q You did didn't use any names?

A (Witness moves head from side to side.) No. That's all I said to her.

Q You didn't use any names?

A I used her own name. I said Nadine and that's not her name.

Q Okay. But when you talk about this trial, you didn't refer to the Saylors?

A No. Huh-uh. It was no name of no trial mentioned. I just said, "I know, I've sat through this trial before."

THE COURT: All right. You're excused. You may go. Is there any reason I – do I

* * *

(p. 78) excused.

MR. VICK: May it please the Court, may we approach just one second before the jurors leave?

THE COURT: Before they leave? Wait just a minute here. Give me just a minute, please.

(Thereupon, an off-the-record discussion was held.)

THE COURT: All right. Excuse me. I was about to let you go. The five of you except Mrs. Bell go in the jury room. I won't keep you much longer. Thanks very much for your patience with me. I don't want to wear you out. Mrs. Bell, would you come back around, please, and Mr. Crossley here for the defendant, he's got some questions he wants to ask you further. Why don't you just ask her what you –

MR. CROSSLEY: All right.

NAYDELL S. BELL,
after being previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROSSLEY:

Q Mrs. Bell, after you had you conversation with Mrs. Taylor and she reminded you that she knew you 20, 30 years ago, did you after (p. 79) that remember that you knew her 20, 30 years ago?

A Oh, I didn't have a conversation with her. I realized later when I looked out in the courtroom and tried to figure out who that was, you know, because I didn't recognize her, you know, even after I left the restroom, I thought I recognized her husband who hadn't changed as much as she had and – and I was – you know, because he's a businessman here in town, was, I recognized him. I had no conversation. Then I knew I knew the Shaw Taylors from First Baptist Church in Winchester when I was growing up.

Q Okay. Excuse me. I misunderstood because I thought you had said earlier that she told you who she was and that you knew her 20, 30 years ago?

A No, sir. No. sir.

Q Okay. But you recognized her husband after that conversation and realized who he was?

A Yes.

A Okay. Did you also know Mr. Shaw Taylor's nephews, Ed Taylor and his brother, who operated a dairy farm in Lincoln County?

A No, sir, I did not and I still do not. I only know their son who also went to church (p. 80) with me.

Q Mr. Shaw Taylor's son?

A Right. That's the only relatives I knew of the Taylors because I was not close to them. I only knew them as a church member.

Q Okay. Back during the voir dire examination when the jurors were being asked questions before the jury was impaneled, the Court read off a list of the names of people who were going to be witnesses in the case.

A Uh-huh.

Q And I believe Ed Taylor was one of those names read off.

A I remember that name being read, yes, and I searched my mind do I know any Taylors in Lincoln County, I believe it was, and I did not, you know. I didn't know any Taylors other than here and, you know, I didn't

know any dairymen or I didn't know, you know – over the list you read, you know, I searched my mind do I know these people and I certainly did not.

Q Okay. Did you ever make a statement that you can now recall to any of the other jurors about who these people were who were sitting out here watching the trial? After you realized who (p. 81) that was, did you ever make any statement to any of the jurors about who they were?

A I – I don't recall saying that, you know, whether I – you know, I don't – I don't think I said anything about remembering who they might be. I don't think I – you know, that I went to church with them 20 years ago or anything. If I – you know, if I even said that statement, which I don't believe I did to them during the course of the case, I don't remember it. I didn't say anything that had to do with the case, I know that.

Q Okay. Did you at any time during the trial even up to the time that Ed Taylor testified ever make any connection between him and Mrs. Shaw Taylor?

A No, sir.

Q You were wholly unaware even at the end of the trial that he was related to here or to her husband?

A I was unaware of it, yes.

THE COURT: Okay. Mrs. Taylor – that's all. Is that all we have for her?

MR. CROSSLEY: Yes, Your Honor.

THE COURT: I mean, Mrs. Bell, you're excused. I want to thank you very much for your (p. 82) conscientious service on the jury. You did in the bathroom just exactly like I told you. I tell jurors that all the time and I tell people to do things all the time and I wonder if they do. You did what I told you to do. I said don't let anybody talk to you about this case, don't talk to anybody about it yourself and if they tell you – start to talk to you, tell them you're a juror and report it back to me. You did the whole thing. Thank you very much.

MRS. BELL: Thank you.

THE COURT: You're excused. Have you got her slip?

MS. CLERK: Yes, sir.

THE COURT: We'll pay you for being here. You may go.

MRS. BELL: I apologize to the Court, but it did not influence me in any way, I can assure both sides of that. It had no affect.

THE COURT: Okay. Thanks very much. Now, then, what do you want to do? Do you want to make – do you want to argue this further or do you want – you still want more time to put a brief in or what?

MR. CROSSLEY: Yes, Your Honor, we'd

* * *

REPLY

BRIEF

FILED
OCT 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

A.O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,

Petitioners,

v.

JAMES D. SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF

DONALD E. EGAN
LEE ANN WATSON
Counsel of Record
CYNTHIA PHOTOS ABBOTT
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Chicago, Illinois 60606
(312) 902-5200

Attorneys for Petitioners

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. The Courts Below Did Not Hold That Petitioners Waived The Juror Misconduct Issue 2

II. The Sixth Circuit Did Not Hold That The Communication Was "Harmless" Because It Did Not Apply The *Remmer* Rebuttable Presumption 5

CONCLUSION 9

APPENDIX

Affidavit of Richard E. Herod ..... App. 1

TABLE OF AUTHORITIES

CASES:	PAGE
Barker v. Wingo, 407 U.S. 514 (1972)	3
Johnson v. Zerbst, 304 U.S. 458 (1938)	2, 4, 5
Nolan v. Nolan, 97 F.R.D. 537 (S.D. W. Va. 1983) ..	3
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937)	2, 3
United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982)	7, 8
United States v. Bassler, 651 F.2d 600 (8th Cir.), *cert. denied*, 454 U.S. 944 (1981)	7
United States v. Bufalino, 576 F.2d 446 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978)	3
United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987)	8
United States v. Dean, 667 F.2d 729 (8th Cir.), *cert. denied*, 436 U.S. 1006 (1982)	3
United States v. Delaney, 732 F.2d 639 (8th Cir. 1984)	7
United States v. Gersh, 328 F.2d 460 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964)	3
United States v. Hornung, 848 F.2d 1020 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1349 (1989) ...	6, 7
United States v. Moten, 582 F.2d 654 (2d Cir. 1978)	4, 5
United States v. Shackleford, 777 F.2d 1141 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986) ..	3

No. 89-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

A.O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,

Petitioners,

v.

JAMES D. SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF

The Petition establishes that there is a conflict in the circuits with respect to the application and continuing viability of the *Remmer* presumption of prejudice when a potentially prejudicial extraneous communication is made to a juror. The Petition similarly demonstrates that the Sixth Circuit's interpretation of Federal Rule of Evidence 606(b), defining the limits on questioning jurors about the effect of an outside communication, is in conflict with all other circuits which have addressed the issue.

The Respondents do not dispute these conflicts, nor do they quarrel with their importance and impact on civil and criminal litigants' fundamental right to a jury whose decision is based only on evidence admitted at trial. Instead, the Respondents argue that this is not the appropriate case to resolve those issues because the facts and not the legal issues were dispositive. Their argument is not only wrong, misleading, and largely unresponsive, but the so-called factual "finding of harmlessness" upon which they rely is: (1) not to be found in the decision below; and (2) begs the question since the issue before this Court is whether the Sixth Circuit erroneously failed to afford the Petitioners an evidentiary presumption of prejudice to which they were entitled.

I. The Courts Below Did Not Hold That Petitioners Waived The Juror Misconduct Issue

Neither the District Court nor the Sixth Circuit found that the Petitioners waived their right to a postverdict inquiry of the jurors, nor their right to subsequently move for a new trial upon establishing that an outside communication regarding the prior trial was made by an interested spectator related to a witness for the Respondents.[1] As this Court has repeatedly said:

> [W]e "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301

[1] Indeed, had the District Court found a waiver, it never would have conducted the judicial inquiry. Likewise, had the Sixth Circuit held there was a waiver, there would have been no need for it to have reached the issue of whether *Phillips* effectively overruled the *Remmer* presumption.

U.S. 292, 307 (1937)). *Accord Barker v. Wingo*, 407 U.S. 514, 525-26 (1972).

In contrast to the cases relied upon by the Respondents,[2] the Petitioners were not advised of all of the facts surrounding the outside communication to the juror during the trial. (JA 87-89). Indeed, the Respondents are not being candid when they state that "no facts were withheld" and quote only from the affidavit submitted by the spectator, Mrs. Shaw Taylor. (Brief In Opposition at 3, 8).

Richard E. Herod, one of Petitioners' trial counsel, also submitted an affidavit to the District Court when it was considering whether to conduct the posttrial judicial inquiry. (JA 87). However, notably absent from the Respondents' Brief In Opposition is any mention of the fact that Petitioners' counsel was only able to speak to the spectator for less than one minute before trial reconvened. (JA 88). In fact it is telling that although the Respondents recite in full the spectator's affidavit they omit the following excerpts from Mr. Herod's affidavit:[3]

> 5. . . . Because the conversation was interrupted, I did not get an opportunity to obtain

---

[2] *See* Brief In Opposition at 7-8 citing *United States v. Gersh*, 328 F.2d 460 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964); *United States v. Shackleford*, 777 F.2d 1141 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986); *United States v. Dean*, 667 F.2d 729 (8th Cir.), *cert. denied*, 436 U.S. 1006 (1982); *United States v. Bufalino*, 576 F.2d 446 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978); *Nolan v. Nolan*, 97 F.R.D. 537 (S.D. W. Va. 1983).

[3] The entire affidavit is contained in the Appendix to this Reply Brief. It is also noteworthy that although the Respondents selectively reprint portions of the judicial inquiry in their Appendix to the Brief In Opposition, they do not reprint the entire transcript. The complete transcript is, however, contained in the two-volume Joint Appendix ("JA") which was filed with the Sixth Circuit and which the Petitioners have lodged with the Clerk of the Court.

> the identity of the spectator or to interview her regarding the full content of the conversation.
>
> 6. During my initial conversation with Mr. McCune [counsel for Respondents] and during the subsequent proceedings in chambers when Mr. McCune reported the incident, *he at no time identified the spectator as a person with whom he was acquainted or who was related to one of his clients, Ed Taylor, who testified in this case and who also has a claim against AOSHPI.*

(App. 2-3) (emphasis added).[4]

Thus, unaware that the spectator was not merely an uninterested observer but a relative of a witness who testified for the Respondents, who had filed his own lawsuit against the Petitioners, there was no waiver. *See United States v. Moten*, 582 F.2d 654 (2d Cir. 1978):

> *Gersh* is inapplicable here because at the time the government suggests that counsel should have sought further inquiry, counsel had been denied access to the *in camera* examinations. *If counsel had known*, for example, that Viola Intersimone had told the court that Keno had been talking to someone immediately before he approached her, *they may well have sought further inquiry*. In the circumstances, it cannot be said that there was a knowing and intelligent waiver.

Id. at 667 (emphasis added) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). As in *Moten*, had Petitioners' counsel

---

[4] Moreover, the trial judge indicated at the judicial inquiry that he did not believe there was a waiver by observing that very little was known about the incident during trial:

> Well, they [Respondents' counsel] did report it to the Court. Let me put that in the record. I understood everybody made—*nobody knew much about it*, but a report was made by both of you in chambers that there was a conversation—I think the plaintiffs, you reported it.

(JA 506-07) (emphasis added).

been aware of the spectator's interest in the case, Respondents' counsel's knowledge of her identity and of her relationship to the Respondents' witness, counsel "may well have sought further inquiry." Since all of the facts were not known, there was no waiver. *Johnson*, 304 U.S. at 469; *Moten*, 582 F.2d at 667. Indeed, neither the District Court nor the Sixth Circuit so held.

II. The Sixth Circuit Did Not Hold That The Communication Was "Harmless" Because It Did Not Apply The *Remmer* Rebuttable Presumption

Contrary to the Respondents' suggestion, the Sixth Circuit did not hold that the Petitioners failed to establish the requisites for the *Remmer* presumption or that the Respondents had successfully rebutted the presumption because they proved the contact was harmless. Rather, the Sixth Circuit explicitly held that the *Remmer* presumption no longer applies and the Petitioners failed to prove that the outside communication resulted in actual prejudice, stating:

> [I]f *Remmer* were controlling law, the burden would have been on the [Respondents] to establish lack of prejudice from the unauthorized contact. . . .
>
> * * *
>
> Because the holding in *Pennell* applies equally well to pre-verdict and post-verdict hearings for juror prejudice, *the defendants in this case bore the burden of proving that the extraneous juror contact resulted in actual prejudice. Since the defendants failed to carry that burden*, the district court did not abuse its discretion in denying their motion for a new trial on this ground.

(JA 437-38) (emphasis added).

Indeed, Respondents devote a large portion of their Brief In Opposition to responding to an argument that was not, and is not, asserted by the Petitioners—"due to the proscription of Rule 606(b) of the Federal Rules of Evidence, after a verdict has been returned by the jury, the presumption is conclusive." (Brief In Opposition at 9-10). Petitioners recognize that the *Remmer* presumption of prejudice is rebuttable and that it can be overcome, for instance, if the communication is proven to be harmless and did not contend otherwise in their Petition.[5]

The question presented, however, is not the effect of the *Remmer* presumption (i.e., rebuttable or conclusive) or whether it was rebutted in this case. Rather, the issue addressed by the Sixth Circuit and of which review is sought is whether the *Remmer* presumption is still viable. In other words, Petitioners do not contend that, absent the *Remmer* presumption, they proved actual prejudice. Rather, it is Petitioners' position that: (1) they were entitled to the presumption; and (2) for the policy reasons discussed in their Petition[6] the Respondents could not use the jurors' self-serving answer to the District Court's inquiry regarding the effect of the extraneous communication to rebut the presumption.

Similarly, the Respondents' argument that the District Court's finding of harmlessness is entitled to great weight and that it was not based on the question to the jurors regarding the effect on their verdict of learning of the prior trial is baseless.[7] (Brief In Opposition at 10-18). In-

---

[5] *See* Petition at i, 9, 11. *See, e.g., United States v. Hornung*, 848 F.2d 1040, 1044-45 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1349 (1989).

[6] *See* Petition at 18-19.

[7] Although the Respondents implicitly concede that this question violated Rule 606(b) and that the Sixth Circuit erred in its inter-

(Footnote continued on following page)

itially, it is telling that the Respondents' assertion, that "there was sufficient unquestionable admissible evidence . . . to show that the contact was harmless" without the question inquiring into the effect of the communication, is unsupported rhetoric. (Brief In Opposition at 9, 19, 20). Respondents do not point this Court to even one example of that evidence. The explanation for the omission is simple. There is no such evidence in the record.

The materiality to the trial judge of the jurors' assurances that they did not consider the effect of the outside communication regarding the first trial in reaching their verdict is readily revealed by the position taken by him prior to trial. Before the commencement of the second trial, he ruled that it would be prejudicial if the jurors learned that this case was being tried a second time:

> THE COURT: Yes, I don't want that done at all by anybody. It's not proper, and there is ab-

---

[7] *continued*

pretation and application of Rule 606(b), they nonetheless assail the Petitioners' analysis of cases interpreting Rule 606(b), arguing that many of those cases involved "post-verdict hearings in which the circumstances surrounding the extraneous influence are inquired into." (Brief In Opposition at 11). What Respondents fail to comprehend, however, is that although the courts in those cases allowed the circumstances of the outside influence to be explored, they did not, as the trial court did here and as the Sixth Circuit approved, permit inquiry into the *effect* of the extraneous communication. *See, e.g., United States v. Hornung*, 848 F.2d 1040, 1045 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1349 (1989) ("The court's questioning of a juror who is the recipient of extraneous information is limited to the circumstances and nature of the improper contact, as Fed. R. Evid. 606(b) precludes the court from delving into the subjective effect of the contact on the juror's decision-making."); *United States v. Delaney*, 732 F.2d 639, 643 n.6 (8th Cir. 1984) (juror's affidavits inadmissible to show how certain statements affected deliberations). *See also United States v. Bagnariol*, 665 F.2d 877, 889 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir.), *cert. denied*, 454 U.S. 944 (1981).

> solutely no proper—the way it was tried before has nothing at all to do with what the judgment should be of this jury now, and we all—I am telling everybody to prevent that from happening at all cost . . .
>
> But I agree with that, and we all agree with that, and we all know that, *and I am saying now, everybody is enjoined from in anywise [sic] telling the jury anything as far as that goes.*

(JA 437-38) (emphasis added).[8] Accordingly, the District Court appropriately instructed the parties and their counsel to not inform the jury, in any manner whatsoever, of the *existence*, not merely the outcome, of the first trial.[9]

Finally, any lingering doubt about the impact of the question prohibited by Rule 606(b) is removed by the trial judge's own comments during the judicial inquiry in which he made it clear that he would consider the jurors' answer:

---

[8] Thus, this is not a situation where the statement was innocuous on its face since the trial court had granted the motion in limine prohibiting any comments that would advise the jury of the first trial. Hence, the cases cited by Respondents are not apposite. (Brief In Opposition at 15-16 n.4).

[9] Indeed, in the small rural Tennessee community where both trials were conducted it is likely that most, if not all, of the jurors at the second trial had heard of a $1,000,000 verdict in favor of local farmers at the time of the first trial. Hence, when they learned that they were deciding the case for the second time, the jurors may well have concluded on their own that this is the same case which they heard about two years earlier and that it was the Respondents who had been the victors in the first trial. This is not, therefore, like the cases cited by Respondents such as *United States v. Butler*, 822 F.2d 1191, 1196 (D.C. Cir. 1987), where the communication "did not provide the juror with any crucial extrajudicial information," or *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982), where there was no "direct and rational connection between the extrinsic material and prejudicial jury conclusion." *Id.* at 885.

> THE COURT: I'm fixing to ask these six jurors did they decide this case on the evidence they heard in this courtroom and on the law that I gave them and nothing else, *and I want to know what their answer is and if it's error, then we'll strike it from the record as though it didn't happen and you can correct the error when you get up to the Sixth Circuit*, but if I don't ask it they may send it back for me to ask them.

(JA 566) (emphasis added). The question was not stricken, however, by the Sixth Circuit. Nor did the Sixth Circuit believe the question was unnecessary to the trial judge's finding as the Respondents suggest in an attempt to deflect this Court's attention. Had that been the case, the Court of Appeals could have said so instead of adopting its strained interpretation of Rule 606(b) in conflict with other circuits in order to affirm the District Court. (Pet. App. 12-13). *See* Petition at 13-17.

CONCLUSION

In sum, the Sixth Circuit's view, that the *Phillips* requirement that actual prejudice must be proven in a juror bias case has effectively overruled the *Remmer* presumption of prejudice in an extraneous contact case as applied to a postverdict hearing, is indisputably in conflict with all of the other courts of appeal to have considered the issue. Even the Respondents concede this point. Accordingly, they attempt to argue that the resolution of this important issue should not occur in this case because the Sixth Circuit's conclusion was fact driven. Their argument is simply not supported by the Sixth Circuit's decision. Rather, it was the Sixth Circuit's erroneous interpretation and application of this Court's decision in *Phillips* that resulted in the Petitioners being deprived of the

presumption of prejudice established in *Remmer*, and concomitantly the new trial to which they were entitled.

For the foregoing reasons and those set forth in the Petition, Petitioners respectfully submit that the issues presented are of such exceptional importance as to warrant review by this Court.

Dated: October 6, 1989

Respectfully submitted,

DONALD E. EGAN
LEE ANN WATSON
Counsel of Record
CYNTHIA PHOTOS ABBOTT
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Chicago, Illinois 60606
(312) 902-5200

Attorneys for Petitioners

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

AGRISTOR LEASING, A Wisconsin Partnership, Plaintiff v. JAMES SAYLOR AND wife, KAAREN SAYLOR, Individually and DBA "UDDER NONSENSE DAIRY", Defendants, Counter-Plaintiff and Third-Party Plaintiffs v. A. O. SMITH CORPORATION; A. O. SMITH HARVESTORE PRODUCTS, INC.; HERMITAGE HARVESTORE SYSTEMS, INC.; AND CHUCK DOWDY, Third-Party Defendants.	No. CIV-4-83-94 Jury Demand

AFFIDAVIT

Comes the deponent, Richard E. Herod, and makes oath and states as follows:

1. That I am counsel for A. O. Smith Harvestore Products, Inc., a party defendant in the above-captioned ac-

tion; and that in said capacity I attended the trial of this case in June, 1987.

2. During a break in the trial of the above-captioned matter, I was approached by Malcolm McCune, counsel to the plaintiffs in this case. Mr. McCune advised that he needed an audience with the Court out of the presence of the jury to discuss a matter that had been brought to his attention by his client, Kaaren Saylor.

3. Upon inquiry, Mr. McCune stated that he had been advised that a conversation had taken place in the hearing of his client in the "ladies room" during that recess in which a spectator had told a member of the jury panel that she (the spectator) had attended the last trial. In this conversation, Mr. McCune identified the spectator only as a gray-haired lady who was in the courtroom with her husband during several days of the trial. Mr. McCune indicated that the conversation had involved the female juror who sat in the middle of the back row of the jury panel, Ms. Peggy Lawwell.

4. Following this conversation with Mr. McCune, I returned to the courtroom and went to speak with the spectator described by Mr. McCune. She was pleasant but extremely nervous and reluctant to speak to me. My conversation with her was interrupted when Judge Hull returned to the courtroom to reconvene the trial. I estimate that the entire conversation lasted less than one minute.

5. The only information that I was able to obtain from the lady was that she had in fact spoken with a member of the jury panel; that she was personally acquainted with that juror; and that she had stated to the juror that she had attended the first trial. Because the conversation was interrupted, I did not get an opportunity to obtain the identity of the spectator or to interview her regarding the full content of the conversation.

6. During my initial conversation with Mr. McCune and during the subsequent proceedings in chambers when Mr. McCune reported the incident, he at no time identified the spectator as a person with whom he was acquainted or who was related to one of his clients, Ed Taylor, who testified in this case and who also has a claim against AOSHPI.

7. Following the conclusion of the trial, I undertook to identify and locate this spectator for the purpose of discussing the proof presented at trial in an effort to evaluate the impact of the evidence upon an individual who I believed shared a similar demographic background to the jury panel. In the course of this endeavor, I learned that the spectator was related to Ed Taylor and was "very interested" in the litigation. I also learned that this individual was personally known to Mr. McCune, a fact which I confirmed in a telephone conversation with Mr. Tony Vick, who assisted him in the case.

The undersigned after being duly sworn states that the facts and statements contained in the foregoing are true and correct to the best of his knowledge and belief.

/s/ Richard E. Herod
Richard E. Herod

State of Tennessee)
)
County of Davidson)

Subscribed and sworn to before me this 16th day of October, 1987.

/s/ Suellen Douglas
Notary Public

My commission expires: 7-10-90